IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MICHAEL LEE TUCKER,	)	
Plaintiff	)	
vs.	)	
OFFICER C. CARR, OFFICER SEAMON, Sgt. HIENTSENRIDER and OFFICER GRIMME,	)	Civil Action No. 03-1548
Defendants	)	Judge Thomas M. Hardiman/ Magistrate Judge Lisa Pupo Lenihan

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

RECOMMENDATION

It is recommended that the case be dismissed due to Plaintiff's failure to prosecute and/or for failure to respond to the court's order.

REPORT

Michael Lee Tucker ("Plaintiff"), initiated this civil rights case by filing a Motion to Proceed In Forma Pauperis (Doc. 1) on October 15, 2003. Magistrate Judge Hay granted the motion and ordered the complaint (Doc. 4) to be served by the Marshal. Since service by mail was not able to be accomplished as the requests for waiver of service were not returned, possibly due to the sketchy information on the addresses of the defendants, the

court ordered duplicate summonses and complaints be prepared to be served in person by the Marshal. The duplicates were prepared but the Marshals were unable to serve them without directions from Plaintiff. A letter was sent to the Plaintiff requesting information, but no response was ever received. It appears Plaintiff may have changed institutions, without informing the court, as is his responsibility, as the court clearly explained to him in its order granting him pauper status. The case is now more than a year and half old without the complaint ever being served. The case has been transferred to the undersigned.

As a result of the inactivity on the docket, the court issued an order on May 17, 2005 directing Plaintiff to show cause by June 6, 2005 why this case should not be dismissed for failure to prosecute. Doc. 10. That order informed Plaintiff that failure to respond to the order could result in a recommendation that his case be dismissed. Plaintiff never responded to the order.

Rule 41(b) deals with involuntary dismissals and provides, in relevant part, that a court may dismiss an action

> [f]or failure of the plaintiff to prosecute or to comply with these rules or any order of court . . . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

"A Rule 41(b) dismissal may be entered sua sponte or on motion of

a party." Pickel v. United States, 746 F.2d 176, 182 n.7 (3d Cir. 1984). A court's decision to dismiss for failure to prosecute is committed to the court's discretion. See Collinsgru v. Palmyra Bd. of Educ., 161 F.3d 225, 230 (3d Cir. 1998)("We review for abuse of discretion a district court's dismissal for failure to prosecute pursuant to Rule 41(b)."). In exercising that discretion, a district court should, to the extent applicable, consider the six factors known as the Poulis factors[1] when it levies the sanction of dismissal of an action for failure to obey discovery schedules, failure to prosecute or to comply with other procedural rules. Harris v. City of Philadelphia, 47 F.3d 1311, 1330 n.18 (3d Cir. 1995). Those six Poulis factors are:

> (1) the extent of the party's personal responsibility; (2) the prejudice to the adversary caused by the failure to meet scheduling orders and to respond to discovery; (3) a history of dilatoriness; (4)whether the conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and (6) the meritoriousness of the claim or defense.

Id. However, "*Poulis* did not provide a magic formula whereby the decision to dismiss or not to dismiss a plaintiff's complaint becomes a mechanical calculation easily reviewed by" the Court of

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[1] See e.g., Emerson v. Thiel College, 296 F.3d 184, 190 (3d Cir. 2002)("In considering the second *Poulis* factor . . ."). Poulis refers to Poulis v. State Farm Fire and Cas. Co., 747 F.2d 863, 868 (3d Cir.1984).

Appeals. Mindek v. Rigatti, 964 F.2d 1369, 1373 (3d Cir. 1992). For the Court of Appeals has recognized that "not all of the *Poulis* factors need be satisfied in order to dismiss a complaint. *See C.T. Bedwell & Sons, Inc. v. Int'l. Fidelity Ins. Co.*, 843 F.2d 683, 696 (3d Cir.1988). Instead, the decision must be made in the context of the district court's extended contact with the litigant." Id.

In considering the Poulis factors to the extent applicable herein, factor one appears to weigh in favor of dismissal for, unlike a represented party who could blame failures on an attorney, Plaintiff (who is pro se) alone appears to be responsible for not keeping the court informed of his current address and for not complying with the court requests for information and not responding to the order to show cause. As the Defendants have never been served, this court has difficulty in determining the second Poulis factor of prejudice to the defendants, but the fact that they have not been alerted to the possibility of a lawsuit against them and, with the passage of time comes the fading of memories, there is a distinct possibility of prejudice. Nevertheless, the court will not consider this factor as weighing for or against Plaintiff because the court simply does not have knowledge of this factor. Taking up factor number three, it appears that Plaintiff has a history of failing to comply with court orders, in that he failed to keep

the court informed of his current address, he failed to supply the court with information regarding the Defendants for purposes of serving the complaint and he failed to respond to this court's show cause order. It is difficult to discern whether Plaintiff's failings were willful or in bad faith. In considering the fifth factor, it does not appear to this court, after giving Plaintiff fair warning and an opportunity to show cause why the case should not be dismissed, what other action the court can take to cause Plaintiff to move the case forward. Next the court addresses factor number 6, it is difficult to assess the meritoriousness of Plaintiff's claims with just the barest of allegations from the complaint.

In considering all of these factors, the court finds most significant Plaintiff's failures to respond to requests for information and his failure to keep this court informed of his address. The court deems these to be a good barometer of Plaintiff's will, or lack thereof, to prosecute this case. In light of this, the court recommends that the case be dismissed for failing to comply with court orders and/or for failing to prosecute.

Alternatively, this court recommends that the District Court enter an order, sua sponte, pursuant to its inherent power, to immediately dismiss the action based upon Plaintiff's continued obduracy in failing to respond and/or in disobeying court orders.

See, e.g., John's Insulation, Inc. v. L. Addison and Associates, Inc., 156 F.3d 101,108 (1st Cir. 1998) wherein the court observed that

> "A district court has broad authority to ... dismiss a case for failure to obey ... orders," *Robson v. Hallenbeck*, 81 F.3d 1, 2 (1st Cir.1996). One source of such authority is Fed.R.Civ.P. 41(b). On the other hand, "the rules of civil procedure do not completely describe and limit the power of district courts." *Brockton Sav. Bank v. Peat, Marwick, Mitchell & Co.*, 771 F.2d 5, 11 (1st Cir. 1985). Indeed, "[i]t has long been understood that certain implied powers must necessarily result to our Courts of justice from the nature of their institution, powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (citations omitted). Those inherent powers to sanction parties for litigation abuses include the power to "act sua sponte to dismiss a suit for failure to prosecute," *id.* at 44 (citing *Link*, 370 U.S. at 630-31), and to enter default judgment, *see Brockton Sav. Bank*, 771 F.2d at 12.

See also Link v. Wabash R. Co., 370 U.S. 626, 630-31 (1962)("The authority of a court to dismiss sua sponte for lack of prosecution has generally been considered an 'inherent power,' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."). The Court in Link noted that courts possess the inherent power to act sua sponte "to clear their calendars of cases that have remained dormant because of the inaction or dilatoriness of the parties seeking relief." Id. at 630. Given the inaction of Plaintiff, which has caused this case to remain dormant for more than a

year, it is recommended that the case be dismissed.

CONCLUSION

In accordance with the Magistrates Act, 28 U.S.C. § 636(b)(1)(B) & (C), and Local Rule 72.1.4 B, the parties are allowed ten (10) days from the date of service to file written objections to this report. Any party opposing the objections shall have seven (7) days from the date of service of the objections to respond thereto. Failure to timely file objections may constitute a waiver of any appellate rights.

Lisa Pupo Lenihan
U.S. Magistrate Judge

Dated: July 18, 2005

cc: The Honorable Thomas M. Hardiman
United States District Judge

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